SUPREME COURT, U. S.

FILED
DEC 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

DECEMBER TERM, 1969

No. 982

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ROBERT W. TURNER, PETE B. ADAMS, BEN T. AUSTIN, III, W. EARL BEARD, SR., W. W. TAYLOR, JR., EUGENE R. OTT, AND JOHN E. MOON, APPELLANTS,

versus

CECIL D. CLAY, FELIX C. DAVIS, MINER W. CROSBY, CHARLES R. WEBB, ALBERT W. HUDSON AND R. WOODY ROGERS, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

HARRY M. LIGHTSEY, JR.,
1518 Washington Street,
Columbia, South Carolina,
Attorney for Appellants.

OF COUNSEL:

HANS F. PAUL,
JAMES E. GONZALES.

December 12, 1969.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Table of Authorities	iii
Introduction	1
Opinions Below	2
Statement of Grounds on Which the Jurisdiction of This Court is Invoked	2
Constitutional Provisions and Statutes Invoked	4
Question Presented by This Appeal	4
Statement of the Facts of the Case	4
The Federal Question Presented is Substantial	6
A. The Substantial Importance of Such a Federal Question as That Presented by This Appeal Has Been Clearly Demonstrated Previously by This Court	6
B. The History and Principles of the Decision of This Court do not Support the Decision of the South Carolina Supreme Court, but Require Its Reversal	7
C. The Decision of the Supreme Court of South Carolina is in Direct Conflict with Recent Decisions of Other States	9
D. The Decision of the State Court is Far Reaching in Its Actual and Practical Effect on the Appellants and Others Similarly Situated	11
Conclusion	12
Appendix A, Decision of the Supreme Court of South Carolina	13
Appendix B, Order Denying Petition for Rehearing	20

TABLE OF AUTHORITIES

PAGE

Bogert et al. v. Kinzer et al., Register No. 27864 Idaho (1969) 9

Cass County v. Johnston, 94 U. S. 360 (1877) 8

Harper v. Virginia Bd. of Elections, 330 U. S. 665 (1966) 7

Kramer v. Union Free School District, 89 S. Ct. 1886 (1969) 7

Lance v. Roane County Board of Education, Opinion No. 12809 W. Va. (1969) 9

Reynolds v. Sims, 377 U. S. 533 (1964) 6, 8, 9

State v. State Canvassing Board, 78 N. M. 682, 437 P. (2d) 143 (1968) 11

Constitutional Provisions and Statutes:

Constitutiton of the United States:
Fourteenth Amendment 2, 4, 9, 10

Constitution of South Carolina:
Article 8, Section 2 .....2, 4, 5, 7, 8

Code of Laws of South Carolina (1962):
Section 47-353 .....3, 4, 5..

IN THE

Supreme Court of the United States

DECEMBER TERM, 1969

No. .....

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ROBERT W. TURNER, PETE B. ADAMS, BEN T. AUSTIN, III, W. EARL BEARD, SR., W. W. TAYLOR, JR., EUGENE R. OTT, AND JOHN E. MOON, APPELLANTS,

versus

CECIL D. CLAY, FELIX C. DAVIS, MINER W. CROSBY, CHARLES R. WEBB, ALBERT W. HUDSON AND R. WOODY ROGERS, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants appeal from the final Order and Judgment of the Supreme Court of South Carolina entered September 24, 1969, denying appellants' petition for rehearing and its judgment entered September 3, 1969, granting a permanent restraining order to the appellees.

OPINIONS BELOW

The decision of the Supreme Court of South Carolina is reported at 169 S. E. (2d) 617 (1969), and appears herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is a civil action instituted by the appellees in the original jurisdiction of the Supreme Court of South Carolina to restrain the Secretary of State from granting a Charter of Incorporation to the City of North Charleston and to further restrain the elected officials of that community from taking office. The appellees brought this action after a majority of those voters who voted in a special incorporation election had voted for incorporation of the area and elected municipal officials. The election was held pursuant to Code of Laws of South Carolina, § 47-353 (1962), which authorizes the Secretary of State to issue a Certificate of Incorporation if a majority of those voting in such election shall vote in favor of incorporation. The appellees contended in the State Supreme Court that this statute violated Article 8, Section 2 of the South Carolina Constitution of 1895, which provided that no city shall be organized without the consent of the majority of electors residing and entitled by law to vote within the area, their interpretation of this Section being that it required a majority vote of all eligible electors in the area proposed to be incorporated, whether voting or non-voting. The appellants contended that Article 8, Section of the South Carolina Constitution of 1895, if interpreted and applied in the manner urged by the appellees, would be invalid and unconstitutional because such an interpretation would be repugnant to the equal protection clause of the Fourteenth

Amendment to the United States Constitution. The decision of the Supreme Court of South Carolina adopted the interpretation urged by the appellees and ruled against the contention of unconstitutionality and in favor of the validity of Article 8, Section 2, as so interpreted.

The judgment or decree sought to be reviewed is the final ruling of the Supreme Court of South Carolina, entered September 24, 1969, denying appellants' petition for rehearing and its judgment entered September 3, 1969, granting a permanent restraining order to the appellees and declaring Section 47-353 of the 1962 South Carolina Code of Laws in violation of Article 8, Section 2 of the South Carolina Constitution of 1895. The Notice of Appeal was filed in the Supreme Court of South Carolina, the Court possessed of the record, on December 1, 1969.

Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2).

All appellants have standing to appeal since they are voters who voted with the majority of those voting in favor of incorporation, are the elected public officials of the area proposed to be incorporated and have substantial and vital interests involved in that their right to cast an effective vote has been impaired by the decision appealed from.

The following decisions sustain and exemply the jurisdiction of this Court to review, as in this case, a state constitutional provision on the ground that it is repugnant to the United States Constitution, *Railway Express Agency v. Virginia*, 282 U. S. 440; *Adamson v. California*, 332 U. S. 46.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 8, Section 2, of the South Carolina Constitution of 1895 provides:

> "No city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law."

Section 47-353 of the 1962 South Carolina Code of Laws provides in part:

> "If a majority of those voting in such election shall vote in favor of such proposed territory being incorporated, then the Secretary of State shall issue a Certificate of Incorporation of said proposed City, under this Act . . ."

QUESTION PRESENTED BY THIS APPEAL

The following question is presented by this Appeal:

> "Does Article 8, Section 2 of the South Carolina Constitution of 1895 as interpreted and applied by the South Carolina Supreme Court to require more votes for incorporation of a city than a majority of those voting in an election for incorporation deprive the majority of those voting including appellants, of the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment to the United States Constitution?"

STATEMENT OF THE FACTS OF THE CASE

On June 17, 1969, a special incorporation election was held in accordance with South Carolina Statutes in an area designated as North Charleston, which is located north of the present City of Charleston, South Carolina,

and includes approximately 34 square miles and in excess of 94,000 inhabitants. There were approximately 16,900 electors qualified to vote in this area and of these 7,315 cast ballots in the election with 4,572 voters, a clear majority, voting in favor of incorporation. The appellants, with the exception of the Secretary of State, all voted in the election in favor of incorporation and were elected as mayor and aldermen of the proposed city. The results of the election were certified to the appellant Secretary of State for the issuance of a Charter of Incorporation in accordance with Section 47-353 of the Code of Laws of South Carolina (1962), which requires the Secretary of State to issue such a Charter if a majority of those voting in an incorporation election voted in favor thereof. The appellees, as electors and taxpayers, brought this action to restrain the Secretary of State from issuing the Charter and the mayor and aldermen from taking office. The appellees contended that Section 47-353 of the State Code violated Article 8, Section 2 of the South Carolina Constitution of 1895, which requires the consent of a majority of all the qualified electors in an area before a town may be organized. A temporary restraining order was issued and The Supreme Court of South Carolina assumed original jurisdiction of the case because of the immediate public interest involved.

The appellant in its brief, oral argument and petition for rehearing raised the following Federal question which it is asking this Court to review:

> "Would Article 8, Section 2 of the South Carolina Constitution of 1895, be contrary to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, if it is interpreted to require more votes for incorporation than a majority of those voting in the election?"

The Supreme Court of South Carolina specifically decided against appellants on this issue now presented to this Court on appeal, stating:

> "The foregoing argument is based upon the principles announced by the United States Supreme Court in the recent reapportionment cases, citing *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506, among others. These principles have no application here." (P. 18, App., A.)

In its decision, the South Carolina Supreme Court applied and enforced, to the appellants disadvantage, a state constitutional provision which the appellant, in its brief and at all subsequent stages, insisted was, if so applied and enforced, repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The particular question presented on this appeal has never been passed upon directly by this Court. Nevertheless, the circumstance of direct appeal brings, once again, before this Court the fundamental question of the scope of the Equal Protection Clause and the principle of one man-one vote.

A. The substantial importance of such a federal question as that presented by this appeal has been clearly demonstrated previously by this Court.

This Court's decisions, in the area of the application of the Equal Protection Clause to the individual's right of franchise, establishes the importance which the Court has placed upon such issues. No case more clearly demonstrates this point than the Court's decision in *Reynolds v.*

Sims, 377 U. S. 533 (1964), where it re-emphasized the fundamental position that:

> "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.*, p. 562. See also *Kramer v. Union Free School District*, 89 S. Ct. 1886 (1969).

Indeed, the question presented to the Court by this Appeal raises the same issue, an infringement of the citizens' right of effective franchise.

B. The history and principles of the decisions of this Court do not support the decision of the South Carolina Supreme Court, but require its reversal.

The Supreme Court of South Carolina, rejecting the decisions of this Court which have held that the Equal Protection Clause and the principle of one man—one vote is a fundamental right, determined that the State Constitution in Article 8, Section 2, required that a majority of all qualified voters, those voting and those not voting, is needed in an election to allow the incorporation of a town or city. In so holding, the State Court stated that, "These principles have no application here".

Such a decision ignores the fundamental principles and objectives of the Equal Protection Clause as enunciated by this Court. Recently, this Court had occasion, once again, to deal with the area of the Equal Protection Clause and the right of franchise. In its opinion, the Court restated the basic principle that, "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Kramer v. Union Free School District*, 89 S. Ct. 1886 (1969). See also *Harper v. Virginia Bd. of Election*, 330 U. S. 665.

Since the decision of the State Supreme Court recognized a right of incorporation and its exercise through the franchise, but held that more than a majority of those voting was required for favorable State action in establishing the town, the right of franchise has been given to the people but has been subjected to limitation by the number of votes required.

The question then presented is whether such a "line" or "limitation" imposed by the State through Article 8, Section 2, is inconsistent with the Equal Protection Clause. This Court has noted, throughout its decisions on the right of franchise, the wide range of State limitations and discriminations within the reach of the Equal Protection Clause. In speaking of such limitations the Court has said: "One must be ever aware that the Constitution forbids sophisticated as well as simple-minded modes of discrimination" and, furthermore, that "the rights of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting, the free exercise of the franchise". *Reynolds v. Sims*, 377 U. S. 533 (1964). Indeed, in the case before this Court, the State Supreme Court's application of Article 8, Section 2, of the State Constitution has resulted in the "debasement or dilution" of the vote of those voting in favor of incorporation, because the effect of the provision is to add the non-votes to the negative votes cast. Under the actual facts of this case, each negative vote has been given the effect of one and two-thirds affirmative vote. This is not only a violation of the Equal Protection Clause but negates a basic principle of construction espoused by this Court that "all qualified voters who absent themselves from an election are presumed to assent to the express will of the majority of those voting." *Cass County v. Johnston*, 95 U. S. 360.

C. The decision of the Supreme Court of South Carolina is in direct conflict with recent decisions of other states.

The need for resolution of the question presented by this Appeal is clearly demonstrated by the recent division of judicial opinion in the State Courts. In the recent West Virginia case of *Lance v. Roane County Board of Education* (Opinion No. 12809, July 8, 1969; petition for rehearing denied December 2, 1969) that State's Supreme Court held that the state constitutional requirement of a two-thirds and sixty per cent affirmative vote of electors for various bond issues was a denial of Equal Protection of the Laws under the Fourteenth Amendment and, therefore, unenforceable. In reaching their decision, the West Virginia Court stated:

> "We are of the opinion that the one person, one vote principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government."

It should be noted, that the West Virginia Court relied on this Court's decisions in the area of reapportionment, including the landmark case of *Reynolds v. Sims*, 377 U. S. 533. Thus, this decision relied on the same decisions which the South Carolina Court held had no application.

In the case of *Bogert et al. v. Kinzer et al:* (Register No. 27864, 6th Judicial District of the State of Idaho,

County of Bannock, now under appeal and pending in the Supreme Court, State of Idaho, argument heard September 9, 1969), the trial court in a memorandum opinion held that provisions of Idaho Constitution and Statutory law requiring a two-thirds majority vote for approval of a bond proposition for the construction of an airport terminal and a municipal swimming pool were violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and this Court's decisions in *Baker v. Carr,* 369 U. S. 186, 7 Law Ed. 2nd 663; *Gray v. Sanders,* 372 U. S. 386, 9 Law Ed. 2nd 821. The Court stated:

> "By virtue of debasing the vote of one who is voting 'yes' as against the one who is voting 'no', the minority can prevent an educational system, recreation, roads or anything else that require the municipality to be indebted."

Among other cases in litigation, there is now pending before the Supreme Court of California, in its original jurisdiction (Petitions, for Writ of Mandate, filed November 21, 1969, *Westbrook et al. v. Mihaly,* SF 22706; *Adams v. Mihaly,* SF 22707) the question of whether California Constitutional and Statutory provisions requiring the assent of two-thirds of the qualified voting electors for such projects as school facilities, creation of new recreational parks and the modernization of present recreational facilities are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In addition, the Superior Court of Sutter County, California, in the case of *Larez et al. v. Shannon et al.,* Opinion No. 16043, August 8, 1969), decided California's 90-year-old constitutional provision requiring a two-third majority for approval of certain bond issues were in violation of the Equal Protection Clause of the Fourteenth

Amendment. That decision was appealed on December 3, 1969, to the 3rd Judicial Circuit of the California Court of Appeals.

Likewise, still another state, New Mexico, held that its constitutional provision requiring that ratification of any amendment dealing with elective franchise or education had to be ratified by at least two-thirds of those voting in each county was invalid under "one person one vote" principle and the Equal Protection Clause. *State v. State Canvassing Board,* 78 N. M. 682, 437 P. (2d) 143 (1968). These recent decisions from other states dealing with situations and issues similar to the one presented by this case on appeal are an important reason why the Court should resolve the question presented here.

D. The decision of the State Court is far reaching in its actual and practical effect on the appellants and others similarly situated.

The importance of the question presented to the Court by this appeal is clearly revealed in the adverse effect of the State Courts' decision on the appellants and other citizens of South Carolina. For the appellants and other citizens of the North Charleston area, the decision has for all practical purposes denied to them the means of dealing with the critical problems and requirements of a cosmopolitan area through the agency of local self-government. This regretful situation is evident from the fact that the amount of votes that would be required by the State Constitutional provision is actually and historically an unattainable goal. This is illustrated by the fact that such a quantity of voters has never voted in any election held in the area to be incorporated. This situation, likewise, exists for the citizens of any other area in the State who may desire to form a local government in the future. This historical lack of electorate participation in South Carolina

was recognized by the Congress of the United States when it applied the Voting Rights Act of 1965 to South Carolina and other southern states. 42 U. S. C. 1973b. The decision of the Supreme Court of South Carolina has, therefore, not only diluted and debased the citizens vote, but has also denied to them the fundamental right granted by the State to form a government representative of the people and responsible to its local needs.

CONCLUSION

For the reasons stated, appellants respectfully submit the question presented in this appeal is so substantial as to require plenary consideration, with briefs on the merits and oral arguments.

Respectfully submitted,

HARRY M. LIGHTSEY, JR.,
1518 Washington Street,
Columbia, South Carolina,
Attorney for Appellants.

OF COUNSEL:

HANS F. PAUL,
JAMES E. GONZALES.

APPENDIX A

DECISION OF THE SUPREME COURT OF SOUTH CAROLINA

CECIL D. CLAY, FELIX C. DAVIS, MINER W. CROSBY, CHARLES R. WEBB, ALBERT W. HUDSON AND R. WOODY ROGERS, PETITIONERS,

versus

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ROBERT W. TURNER, PETE B. ADAMS, BEN T. AUSTIN, III, W. EARL BEARD, SR., W. W. TAYLOR, JR., EUGENE R. OTT, AND JOHN E. MOON, RESPONDENTS.

IN THE ORIGINAL JURISDICTION

Opinion No. 18958
Filed September 3, 1969

PETITION GRANTED

G. M. Howe, Jr.; and Sinkler, Gibbs & Simons, all of Charleston, for petitioners.

Hans F. Paul, of Charleston Heights; James E. Gonzales, of Charleston; and Berry, Lightsey, Gibbes & Bowers, and Attorney General Daniel R. McLeod, all of Columbia, for respondents.

LEWIS, A. J.: The question to be decided is whether the provision of Section 47-353 of the 1962 Code of Laws, which permits a proposed city or town of over 5,000 inhabitants to be incorporated upon the consent of only a "majority of those voting" in an election held for such purpose, is unconstitutional as conflicting with the provisions of Article 8, Section 2, of the Constitution of this State, which prohibits the organization of any city or town "with-

out the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated."

The consent necessary for the incorporation of a proposed city or town in this State is governed by the requirements of Article 8, Section 2, of the Constitution, which states that "no city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law."

The foregoing constitutional provision was implemented by the Legislature, with reference to the incorporation of proposed cities and towns containing more than 5,000 inhabitants, by the adoption of Section 47-351, *et seq.* of the 1962 Code of Laws. Under these statutes, the consent of the electors to incorporation must be obtained in an election held for such purpose. However, instead of using the language of the Constitution with reference to the consent necessary to incorporate an area, Section 47-353 permits the issue of incorporation to be determined by "a majority of those voting in such election." When a majority of those so voting favor incorporation and such result is certified to the Secretary of State, he is required to issue a certificate of incorporation to the proposed city.

Therefore, while Article 8, Section 2, requires the "consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated," Section 47-353 permits the question of incorporation to be determined by only "a majority of those voting in such election." It is this apparent conflict between the Constitution and the statute which must be resolved.

The question at issue arises out of an attempt to incorporate an area designated as North Charleston, located north of the present City of Charleston, South Carolina, and containing in excess of 94,000 inhabitants. An election was held on June 17, 1969 in the proposed area, in accordance with the statutes, to determine whether it would be

incorporated and to name a mayor and aldermen of the proposed city. There are approximately 16,900 electors residing and entitled by law to vote within the area proposed to be incorporated. Of the qualified electors, 7,315 cast ballots in the election with a majority (4,572) of these voting in favor of incorporation. Therefore, it is apparent that, while a majority of those voting voted favorably, a majority of the 16,900 qualified electors in the area did not cast ballots in favor of incorporation.

Since a majority of those voting in the election voted in favor of incorporation, as required by Section 47-353, the results were certified to the Secretary of State for the issuance of a certificate of incorporation. This action was then brought by the petitioners, as electors and taxpayers in the area proposed to be incorporated, against the respondents, the Secretary of State and those elected mayor and aldermen of the proposed city, to enjoin the Secretary of State from issuing the certificate and the mayor and aldermen from taking office, upon the ground that Section 47-353, under which incorporation was attempted is unconstitutional as conflicting with Article 8, Section 2, of the Constitution. A temporary restraining order was granted so enjoining the respondents, and a rule issued requiring them to show cause why the temporary restraining order should not be made permanent. The Secretary of State, through the Attorney General, has filed a brief upholding the position of petitioners. The respondents, mayor and aldermen of the proposed city, appear in opposition. We assumed original jurisdiction because of the immediate public interest involved.

In determining whether a "majority of those voting" in the election satisfies the constitutional requirement that incorporation cannot be accomplished "without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated," It is elementary that the constitutional provision must be given controlling effect. If the statutory provision in question does not satisfy the constitutional requirement, the statute is to such extent unconstitutional and the

attempt to incorporate the North Charleson area is of no legal effect.

We find the language of Article 8, Section 2, clear, plain, and unambiguous. It requires that a majority of the qualified electors in the area to be incorporated must consent to incorporation, but leaves to the Legislature the right to prescribe how "such consent" of the designated majority is to be ascertained. The constitutional provision does not require an election to ascertain consent, and the Legislature might have just as properly provided for consent to be ascertained through a petition. If the petition method had been adopted, certainly it could not be validly contended that the constitutional requirement could be met by a petition containing the approval of less than a majority of all of the qualified electors in the area. By not specifically designating the method of ascertaining consent and leaving this for legislative determination, the intent was clearly evidenced that, under whatever method adopted, the actual consent of a majority of the electors in the area must be obtained to incorporate a town or city. The meaning of the constitutional mandate does not vary according to the method adopted by the Legislature to implement it.

The argument of the respondents, who attempt to uphold the constitutionality of Section 47-353, concedes, in effect, that the Constitution requires the consent of more than a mere majority of those voting in the election. They contend, however, that the constitutional majority has been obtained in this case since, under the principle stated in *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, and applied in *Paris Mountain Water Company v. City of Greenville*, 110 S. C. 36, 96 S. E. 545, "all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting."

We need not pursue the rationale of the principle stated in the Cass County case and assume its applicability where the controlling law requires the requisite consent to incorporation to be determined by an election. The principle has no application, however, where, as in this

case, the **actual** consent of the designated majority is required regardless of the method used to ascertain it.

While the question was not directly in issue, the construction which we have placed on Article 8, Section 2, has been approved in at least two prior decisions of this court in construing other provisions of the Constitution. *Paris Mountain Water Co. v. City of Greenville, supra,* 110 S. C. 36, 96 S. E. 545; *Whitemire v. Cass,* 213 S. C. 230, 49 S. E. (2d) 1.

In *Paris Mountain Water Company,* the Court stated:

> "We find no provision in the Constitution which prescribes that a majority of all the electors, those voting and those not voting, shall be necessary to carry an election by the people **save in one instance, and that refers to an election to determine if a town shall be incorporated. Article 8, Section 2.**" (Emphasis added.)

In determining whether Article 8, Section 2, applied to the annexation of areas to a municipality, the Court stated in *Whitmire*:

> "Should the quoted provision of the constitution (Article 8, Section 2) be held applicable and controlling here, then it would necessarily follow that the annexation election failed to carry, because it is evident . . . that a majority of all the qualified electors . . ., those voting and those not voting, did not vote for annexation."

Finally, it is argued that the requirement of Article 8, Section 2, of the South Carolina Constitution, results in a denial to the majority of those voting in the election in favor of incorporation, where such majority is less than a majority of all qualified electors, of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Apparently, the contention is that equal protection is denied because the requirements of Article 8, Section 2, deprives the majority, who have voted favorably in the election, of the presumption that all who absented themselves from the elec-

tion are deemed to assent to the expressed will of the majority of those voting—in other words, the failure to indulge such presumption makes the vote of each member of the majority voting in favor of incorporation less effectual. The respondents reason that the effect of Article 8, Section 2, is to add the "non-votes to the negative votes cast," if the foregoing presumption is not indulged, thereby diluting the votes of those persons voting for incorporation.

The foregoing argument is based upon the principles announced by the United States Supreme Court in the recent reapportionment cases, citing *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506, among others. These principles have no application here.

As previously pointed out, Article 8, Section 2, does not require an election. It is simply the exercise by the State of South Carolina of its right to prescribe the requirements for incorporation of municipalities. Under its provisions, a majority of those expressing themselves favorably on the question of incorporation, if less than a majority of all qualified electors, cannot require that an area be incorporated as a town or city. The present argument is, in effect, not that those favoring incorporation are deprived of equal protection, but rather that their votes are not given the effect of overriding the clear constitutional requirement for incorporation of municipalities. Such result cannot be accomplished under the guise of equal protection.

Therefore, regardless of the method adopted to ascertain consent to the incorporation of a town or city, we hold that Article 8, Section 2, of the South Carolina Constitution requires the actual consent of a majority of all qualified electors in the area proposed to be incorporated. To the extent that Section 47-353 permits incorporation upon the actual consent of less than a "majority of the electors residing and entitled by law to vote within the district proposed to be incorporated," it is hereby declared to be unconstitutional. Since the consent of the required majority was not obtained in the election held in this case, the attempt to incorporate the North Charleston area is null, void, and of no legal effect.

The temporary restraining order heretofore granted is accordingly made permanent.

Petition granted.

MOSS, BUSSEY, BRAILSFORD and LITTLEJOHN, JJ., concur.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

September 24, 1969

Messrs. BERRY, LIGHTSEY, GIBBES
and BOWERS
1518 Washington Street
Columbia, South Carolina

Re: *Clay, et al. v. Thornton, et al.*

Gentlemen:

The Court has this day refused your petition for rehearing in the above case in the following order:

"PETITION DENIED.

/s/ Joseph R. Moss	C. J.
/s/ J. Woodrow Lewis	A. J.
/s/ J. M. Brailsford	A. J.
/s/ Thos. P. Bussey	A. J.
/s/ Bruce Littlejohn	A. J."

The opinion is being released for publication today.

FRANCES H. SMITH,
Clerk.

FHS:ml
CC: G. M. Howe, Jr., Esquire.

SUPREME COURT, U. S.

JAN 13 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 982

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ROBERT W. TURNER, PETE B. ADAMS, BEN T. AUSTIN, III, W. EARL BEARD, SR., W. W. TAYLOR, JR., EUGENE R. OTT, AND JOHN E. MOON, APPELLANTS,

versus

CECIL D. CLAY, FELIX C. DAVIS, MINER W. CROSBY, CHARLES R. WEBB, ALBERT W. HUDSON AND R. WOODY ROGERS, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

HUGER SINKLER,
GEDNEY M. HOWE, JR.,
2 Prioleau Street,
Charleston, South Carolina,
Attorneys for Appellees.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

PAGE

Table of Authorities iii

Error in Designation of the Parties 1

The Motion to Dismiss 2

Question Involved 2

Brief in Support of Motion 3

Conclusion 7

TABLE OF AUTHORITIES

PAGE

Avery v. Midland County, Texas, 390 U. S. 474, 88 S. Ct. 1114, ... L. Ed. (2d) 4

Cipriano v. City of Houma, ... U. S. ...., 89 S. Ct. 1897 (1969), 23 L. Ed. (2d) 647 3

Kramer v. Union Free School District No. 15, ... U. S. ...., 89 S. Ct. 1886, 23 L. Ed. (2d) 583 (1969) 4

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506 5

Constitutional Provisions and Statutes:

Constitution of the United States:
Fourteenth Amendment 5, 6

Constitution of South Carolina:
Article 8, Section 2 3

Code of Laws of South Carolina (1962):
Section 47-353 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 982

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ROBERT W. TURNER, PETE B. ADAMS, BEN T. AUSTIN, III, W. EARL BEARD, SR., W. W. TAYLOR, JR., EUGENE R. OTT, AND JOHN E. MOON, APPELLANTS,

versus

CECIL D. CLAY, FELIX C. DAVIS, MINER W. CROSBY, CHARLES R. WEBB, ALBERT W. HUDSON AND R. WOODY ROGERS, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

ERROR IN DESIGNATION OF THE PARTIES

The caption employed by the Appellants herein indicates that all those listed in the category of Appellants seek to have this Court grant an Appeal from the decision of the Supreme Court of South Carolina in this case. Such is not the case. The Appellant, O. Frank Thornton, Secretary of State of South Carolina, is not dissatisfied with the result of the Supreme Court decision. He had affirm-

atively supported the position of the Appellees herein in the proceedings before the Supreme Court of South Carolina, and is filing a separate Motion to Dismiss the Appeal to this Court taken by the Appellants, Turner, Adams, Austin, Beard, Taylor, Ott and Moon.

THE MOTION TO DISMISS

The Appellees herein named, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby move to dismiss the Appeal herein taken on the ground that the Appeal does not present a substantial Federal question inasmuch as:

(a) The State constitutional provision herein involved does not in any manner limit the right of franchise of any elector, and

(b) The State constitutional provision herein involved relates only to the creation of subordinate agencies of State government of South Carolina, whose creation and existence rest in the absolute discretion of the State of South Carolina and are matters of State interest only.

QUESTION INVOLVED

At issue here is whether a State constitutional provision prescribing that no city or town in South Carolina might be incorporated without the consent of the majority of the electors residing, and entitled to vote, within the district proposed to be incorporated, violates the "one man one vote" doctrine promulgated by decisions of the Supreme Court of the United States.

BRIEF IN SUPPORT OF MOTION

Section 2 of Article 8 of the Constitution of South Carolina provides:

> "No city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law."

This provision does not prescribe that an election be held for the purpose of determining incorporation. Nor does it impose any burden on any elector within "the district proposed to be incorporated." Each elector, be he a property owner or otherwise, is an essential part of the "majority" required. Each has equal standing and equal voice. Compare *Cipriano v. City of Houma*, ... U. S. ..., 89 S. Ct. 1897 (1969), 23 L. Ed. (2d) 647. (1969.)

In construing this section, the Supreme Court of South Carolina said:

> "We find the language of Article 8, Section 2, clear, plain, and unambiguous. It requires that a majority of the qualified electors in the area to be incorporated must consent to incorporation, but leaves to the Legislature the right to prescribe how 'such consent' of the designated majority is to be ascertained. The constitutional provision does not require an election to ascertain consent, and the Legislature might have just as properly provided for consent to be ascertained through a petition."

Despite the clear import of the State constitutional language, the General Assembly of South Carolina had enacted a statute providing a method for incorporating "districts" containing a population in excess of 5,000. It provided that following the filing of a petition signed by at least 100 "freehold voters" of the proposed city, an elec-

tion should be held, *inter alia*, upon the question of incorporation. The South Carolina statute imposes no standards by which density of population or geographic boundaries shall be determined and it leaves to those filing the petition the privilege of setting up the boundaries of the proposed city. The statute then provided that if a majority of those voting in such election shall vote in favor of the proposed territory being incorporated, the Secretary of State should issue a certificate of incorporation. This last mentioned provision of the statute was held by the Court to be violative of the quoted section of the State Constitution, and the Supreme Court of South Carolina held:

> "To the extent that Section 47-353 permits incorporation upon the actual consent of less than a 'majority of the electors residing and entitled by law to vote within the district proposed to be incorporated,' it is hereby declared to be unconstitutional".

This is not a case where a State constitutional provision makes certain governmental action dependent upon an election and grants the right to vote to certain *bona fide* residents of requisite age and citizenship and denies the franchise to others. *Kramer v. Union Free School District No. 15* . . . U. S. . . . , 89 S. Ct. 1886, 23 L. Ed. (2d) 583 (1969). Nor is it a case where a State has delegated law making power to local government and dilutes the effective voice of the election process. *Avery v. Midland County, Texas*, 390 U. S. 474, 88 S. Ct. 1114, . . L. Ed. (2d) . . . On the contrary, it is a provision of peculiar State interest relating only to the functioning of State government and is imposed by the State constitution in response to the guarantee to the States of the Union of a republican form of government. Nowhere in this provision is the elective process delegated. Nowhere are some electors treated differently from others.

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506, relied upon by the Appellants, makes clear that the 14th Amendment does not apply to political units of the States. It says:

> "Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U. S. 161, 178, 28 S. Ct. 40, 46, 52 L. Ed. 151, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] * * * and the territory over which they shall be exercised rests in the absolute discretion of the state.'"

It would accordingly seem that the framers of the South Carolina Constitution might or might not have provided for incorporated municipalities.

There are well founded reasons which establish the wisdom of this State constitutional provision. Here involved is an area of 34 square miles with a population in excess of 94,000 people. Here involved is an election called on the petition of only slightly more than 100 "freehold voters." Here involved is an area larger than any incorporated municipality in South Carolina. In comparison, the City of Charleston has an area of 15.6 square miles; the City of Columbia has an area of 22 square miles; and the City of Greenville has an area of 22.4 square miles. The cities named are the State's largest cities.

Situate within the area are only 16,900 qualified electors out of the total population of 94,000. Yet, of this number of qualified electors, only 7,315 persons, or 43% of the

registered electors, voted in the election. While a majority of those voting (4,572) did vote favorably, the percentage with respect to population is less than 5%, and the percentage with respect to total qualified electors is only 27%. The incorporation of any area involves the delegation of specific governmental functions from the State itself to the local unit upon its incorporation. It is a matter of State interest to insist that before local government may be enjoyed, it must be demonstrated that there is a substantial demand therefor in the community to be incorporated. This is a matter of compelling State interest, which can be determined only at the State level. It is not a matter of Federal concern.

Surely, the 14th Amendment did not intend to preclude a state from prescribing reasonable conditions precedent for the establishment of local government. The incorporation of any area inevitably brings with it burdens as well as benefits. Not infrequently do the burdens exceed the benefits, but in all events incorporation imposes the responsibility of local government upon the particular community. Hence, it is not unreasonable to require a showing that a majority of the registered electors of the community are willing to assume the responsibility of local government.

The State constitutional provision here challenged is fair and reasonable. It was ordained in the exercise of the republican form of government guaranteed to the states of the Union. It operates entirely within an area of interest to the State alone and is, therefore, insulated from Federal judicial review.

CONCLUSION

For the reasons herein stated, the Appellees submit that the motion herein made should be granted and the Appeal dismissed.

Respectfully submitted,

HUGER SINKLER,
GEDNEY M. HOWE, JR.,
2 Prioleau Street,
Charleston, South Carolina,
Attorneys for Appellees.

January 12, 1970.

IN THE

Supreme Court of the United States

October Term, 1969

No. 982

O. FRANK THORNTON, Secretary of State of South Carolina, et al., Appellants,

versus

CECIL D. CLAY, et al., Appellees.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

DANIEL R. McLEOD,
Attorney General of South Carolina,
C. TOLBERT GOOLSBY, JR.,
Assistant Attorney General of South Carolina,
Wade Hampton State Office Bldg.,
Columbia, South Carolina,
Attorneys for O. Frank Thornton, Secretary of State of South Carolina.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Motions to Dismiss	1
Question Presented	1
Statement	2
Reasons for Granting the Motion to Dismiss	4
Conclusion	11

CITATIONS

Cases: Page

Adams v. Mihaly, (SF 22707, California) 10

Bogert, et al. v. Kinner, et al., (Register No. 27864, 6th Judicial District of the State of Idaho, County of Bannock) 10

Clay v. Thornton, 8 C. 369, 88 E. (2d) 617 6

Clayton v. Hill City, 111 Kan. 586, 207 P. 720 6

Lance v. Raine County Board of Education, (Opinion No. 12809, W. Va.) 10

Lantz, et al. v. Shannon, et al., (Opinion No. 16013, Superior Court of Sutter County, California) 10

Olney v. Dollison, 194 U. S. 445, 24 S. Ct. 703, 48 L. Ed. 1062 5

Re East Bay Municipal Utility District Water Bonds, 196 Cal. 725, 239 P. 38 6

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506 6

State v. State Canvassing Board, 28 N. M. 602, 437 P. (2d) 143 10

Walston v. Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. Ed. 544 5

Weathrook, et al. v. Mihaly, (SF 22706, California) 10

State Constitution

Article 8, Section 2 1, 3, 4, 5, 7, 8, 9

Code of Laws of South Carolina

S. C. Code 1962, 21-251 1

Annotation

134 A. L. R. 1393 6

IN THE

Supreme Court of the United States

October Term, 1969

No. 982

O. FRANK THORNTON, Secretary of State of South Carolina, et al., Appellants,

versus

CECIL D. CLAY, et al., Appellees.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the Revised Rules of the Supreme Court of the United States, O. Frank Thornton, Secretary of State of South Carolina, an appellee erroneously designated in the Jurisdictional Statement as an appellant, moves the Court to dismiss the appeal herein on the ground that it is manifest that a substantial federal question is not presented.

QUESTION PRESENTED

Whether or not the failure of the Supreme Court of South Carolina to interpret Article 8, Section 2 of the Constitution of South Carolina so as to permit the application of the presumption that electors who do not vote in an election are to be presumed to have acquiesced in the ex-

pressed will of those who do would deny the majority of those electors voting at an incorporation election the equal protection of the laws.

STATEMENT

On April 10, 1969, there was filed with the Secretary of State of South Carolina a petition which indicated that more than one hundred citizens of Charleston County desired that an area containing more than five thousand inhabitants and commonly known as North Charleston be incorporated as a city. The petition, which was signed by at least one hundred freehold voters, suggested that the proposed municipality be named "North Charleston, South Carolina" and described the proposed corporate limits as that area which now constitutes the North Charleston Consolidated Public Service District. It alleged that 94,400 inhabitants resided in the proposed city.

Thereafter, the Secretary of State, on May 1, 1969, issued a commission to seven citizens of the proposed municipality which authorized them to provide for the election required by Section 47-352 of the South Carolina Code of Laws. That election was held on June 17, 1969; and, at that time, 16,900 electors were eligible to vote therein. The commissioners certified the election returns to the Secretary of State on June 18, 1969, and the returns revealed that only 7,315 electors participated in the incorporation election. Of that number, 4,572 favored incorporation while 2,743 opposed it. The name "North Charleston" received the approval of the majority of those voting in the election; and Robert W. Turner, an appellant herein, was elected mayor of the proposed municipality. Pete B. Adams, Ben T. Austin, III, W. Earl Beard, Sr., W. W. Taylor, Jr., Eugene R. Ott, and John E. Moon, who are also appellants herein, were elected aldermen.

In an effort to determine whether or not the incorporation of the proposed City of North Charleston had been legally accomplished, six electors, the appellees, who reside within the proposed city, upon a verified petition, asked leave of the Supreme Court of South Carolina to proceed with their cause in its original jurisdiction. Such was granted on June 19, 1969; and, pending the determination of the issue which the petition raised, the Supreme Court enjoined the Secretary of State from issuing a certificate of incorporation and enjoined those who were designated as mayor and aldermen of the proposed city from attempting to assume their respective offices.

Before the Supreme Court of South Carolina, the appellees, as well as the Secretary of State, who, it should be noted, has erroneously been designated as an appellant in the appeal to this Court, contended that the incorporation of the proposed municipality had not been achieved because a majority of all electors residing in the area sought to be incorporated did not really consent to the proposed incorporation as required by Article 8, Section 2 of the South Carolina Constitution[1] because a majority of them did not actually vote in favor thereof and that the statutory provision, Section 47-353 of the Code of Laws of South Carolina,[2] which would allow the incorporation of an area upon the actual consent of less than a majority of those electors residing in an area proposed to be incorporated was, to that extent, unconstitutional. The appellants, on the other hand, maintained that a majority of all electors who resided with-

[1] "No city or town shall be organized without the consent of the majority of the electors residing and entitled by law to vote within the district proposed to be incorporated; such consent to be ascertained in the manner and under such regulations as may be prescribed by law." S. C. CONST. Art. 8, § 2 (1895).

[2] "If a majority of those voting in (the incorporation) election shall vote in favor of such proposed territory being incorporated, then the Secretary of State shall issue a certificate of incorporation of the proposed city . . .". CODE OF LAWS OF SOUTH CAROLINA § 47-353 (1962).

in the proposed City of North Charleston had consented to the incorporation of that area because all qualified voters that did not vote in that election were to be presumed to have assented to the expressed will of those who did. Further, they argued, any interpretation of the state constitutional provision that would prohibit the application of that presumption would deny the equal protection of the laws to those voting in favor of incorporation and constituting the majority on that election because their votes would, as a consequence, be rendered less effectual.

The contentions of the appellants were rejected and those of the appellees and the Secretary of State adopted when the Supreme Court, on September 3, 1969, made its temporary restraining order permanent. This appeal followed.

REASONS FOR GRANTING THE MOTION TO DISMISS

The appellants maintain that where an election is held in South Carolina to determine whether or not a proposed city is to be incorporated and at that election a majority of the voters, but not a majority of all electors of the area proposed to be incorporated, vote in favor of incorporation, the failure of Article 8, Section 2 of the Constitution of South Carolina, as interpreted and applied by the South Carolina Supreme Court, to permit the application of the presumption that electors who decline to vote in an election are presumed to acquiesce in the decision made by the majority of those who do results in the denial to that majority of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that the failure to employ that presumption renders their votes less effectual.

To sustain an objection that a statute or other law denies a party the equal protection of the laws, it must be

shown that the statute or other law treats the party differently from others who are in the same situation as he. *Ohio v. Dollison,* 194 U. S. 445, 24 S. Ct. 703, 48 L. ed. 1602.

> "And whenever the law operates alike on all persons . . . similarly situated, equal protection cannot be said to be denied." *Walston v. Nevin,* 128 U. S. 578, at 582, 9 S. Ct. 192, 32 L. ed. 544.

The record in this case does not set forth any facts whatsoever that would indicate that the appellants have received treatment different from that which has been administered to others seeking the incorporation of a city or town in South Carolina. Before an area may be incorporated in this State, there first must be actually obtained the consent thereto of the majority of all electors residing and entitled to vote therein notwithstanding the area's location, size, or population and irrespective whether the means chosen by the General Assembly for manifestation of that consent is the petition or election method, or some other. The consent of merely a majority of those who vote in an incorporation election is not sufficient to satisfy the requirements of Article 8, Section 2 of the Constitution of South Carolina. Mayor-designate Turner and the other appellants are as bound by that constitutional requirement as any other similarly-situated elector in this State. No discrimination is practiced upon them.

With regard to the allegation that the failure to apply the aforementioned presumption rendered the appellants' votes in the North Charleston incorporation election and the votes of those who voted as they did less effectual, that assertion cannot be denied because to have applied it would have made their votes more effectual in that the presumption would have caused their votes to have been accorded a weight that would have been far greater than that of the minority who opposed incorporation. To have applied the

presumption in that instance would have meant that, while the 2,743 votes of those who opposed incorporation would have remained at that figure, the majority's 4,572 votes would have counted the same as 8,451 votes, the number needed to constitute a majority of all electors residing and entitled to vote in the proposed city. The application, then, of the presumption would have inflated the votes of those who favored incorporation; and the inflation of one's vote is as reprehensible constitutionally as the dilution of one's vote. No person, this Court has indicated, can be given "twice or ten times the voting power of another." *Reynolds v. Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. (2d) 506 at 525.

The refusal to employ the presumption in this case would not mean, as Turner and the others contend, that all abstaining electors would be classified as having voted against incorporation. More properly, the failure to apply the presumption would mean that all abstaining electors would be regarded as having done what they in fact did, *i. e.,* absented themselves from the election and assumed no position with respect to the question involved therein. Beyond that, it is no less unreasonable to classify abstaining electors as having voted against incorporation than it is to classify them as having voted in favor thereof. A requirement that an election be carried by a majority of all persons lawfully entitled to vote thereat may be an uncommon one, but it is not unheard of; see: *Clayton v. Hill City,* 111 Kan. 595, 207 P. 770; *Re East Bay Muncipal Utility District Water Bonds,* 196 Cal. 725, 239 P. 38; Annot., 131 A. L. R. 1383; and simply because a requirement is unusual does not make it unconstitutional.

As the opinion of the Supreme Court of South Carolina recognizes, *Clay v. Thornton,* —— S. C. ——, 169 S. E. (2d) 617 at 619; Jurisdictional Statement, Appendix A at

16, the election method is not the only means contemplated by Article 8, Section 2 which the electors of a district in this State may be authorized by the legislature to employ in an attempt at establishing a municipal corporation. The General Assembly of South Carolina, if it wishes could adopt the petition method, either as an alternative or as the exclusive means by which the consent of the majority of all the qualified electors in an area sought to be incorporated is to be ascertained. Irrespective which method is chosen or is employed, because of Article 8, Section 2, a majority of all electors in the area must actually consent to incorporation.

> "The meaning of the constitutional mandate does not vary according to the method adopted by the Legislature to implement it." *Id.*

Had the General Assembly provided the petition procedure as an alternative method for seeking the incorporation of an area and had that alternative method been used in the attempt to incorporate the proposed City of North Charleston, 8,451 electors would have actually had to have consented to the incorporation of that territory before it could have been organized into a new municipality. But, if the Equal Protection Clause requires, when the election method is employed, the application of the presumption under discussion, as the appellants contend that it does, theoretically, and admittedly an extremely hypothetical situation, had only one person voted in the incorporation election in favor thereof and had no other elector voted in opposition, that one vote would have been all that was needed to have brought about the creation of the proposed city. Thus, one man's vote would have carried the weight of 8,451; and that one man would have been able to have accomplished that which he could not have done by a petition. Surely, equal protection is not a tool that is to be used for the circumven-

tion of a reasonable state constitutional requirement governing the organization of a state's own political subdivisions.

Apparently, the appellants agree that in South Carolina the legislature could adopt the petition method as a means by which the consent of the majority of all electors to the incorporation of an area could be ascertained and that the consent of a majority of all electors to the incorporation of an area proposed to be incorporated must actually be obtained if that method is used. At least, they do not attack the holding of the Supreme Court in that regard. Although the appellants appear to concede that the election method is not the only procedure which the legislature could have adopted for the manifestation of the requisite consent, they contend, however, that where the election method is nevertheless designated by the legislature as a means of ascertaining the consent of the majority of all electors to the incorporation of a territory, that majority's actual consent is not required since, they argue, the Equal Protection Clause, in that event, allows the consent to be imaginary inasmuch as it necessitates the application of the presumption that those electors who do not vote in an election are deemed as acquiescing in the decision made by those who do. That contention, if upheld by this Court, could result in the election method being regarded by the Supreme Court of South Carolina as an unconstitutional means by which the consent of the majority of all electors of an area to its incorporation may be ascertained. The latter has interpreted Article 8, Section 2 as prohibiting the incorporation of a territory unless, by some authorized means, the majority of all electors residing therein really consent to incorporation; and any method which would allow the incorporation of an area without the consent of the majority of its electors having truly been acquired would violate that state constitutional provision. If, then,

the Equal Protection Clause required the application of the presumption desired by the appellants, the entire incorporation election was necessarily a nullity; and the judgment of the Supreme Court of South Carolina would, therefore, rest upon an adequate non-federal basis.

Somewhat misleading is the question which the appellants claim is involved in their appeal to this Court. See: Jurisdictional Statement at 4. The Supreme Court of South Carolina did not hold, as that question suggests, that Article 8, Section 2 of the South Carolina Constitution is to be interpreted as requiring that in every incorporation election in this State more than a majority of those voting in such an election must vote in favor of incorporation. Rather, the Supreme Court held, as has been mentioned, that when the issue as to whether or not a territory should be incorporated is to be determined by the election process instead of the petition or some other method, before incorporation can be achieved, Article 8, Section 2 requires that a majority of those who vote in an incorporation election in favor thereof also constitute a majority of all electors who reside and are entitled to vote in the district proposed to be incorporated; and a majority of those who vote in an incorporation election can, of course, also constitute a majority of all electors who reside and are entitled to vote in an area.

The appellants allege that the amount of votes required for the organization of a municipality in South Carolina is an amount which is unattainable. That allegation is not supported by the record herein and, moreover, is one with which the Secretary of State cannot agree. The number of persons who will vote in a given election, whether it is for the incorporation of a territory or for some other purpose, will depend upon many factors. Among them are the weather conditions on election day, the publicity given to the issues involved, and the importance of the contest. Perhaps it is a difficult job for incorporators to get a majority of an

area's electors to come to the polls and vote in favor of incorporation; however, it is not an impossible task.

Finally, a claim is made by the appellants that the decision from which they appeal is in direct conflict with recent decisions from other states. Cited are *Bogert, et al. v. Kinzer, et al.,* (Register No. 27864, 6th Judicial District of the State of Idaho, County of Bannock); *Lance v. Roane County Board of Education,* (Opinion No. 12809, W. Va.), *Westbrook, et al. v. Mihaly,* (SF 22706, California); *Adams v. Mihaly,* (SF 22707, California); *Larez, et al. v. Shannon, et al.,* (Opinion No. 16043, Superior Court of Sutter County, California); and *State v. State Canvassing Board,* 78 N. M. 682, 437 P. (2d) 143; Jurisdictional Statement at 9-11. Generally, those cases dealt with the constitutionality of constitutional and statutory provisions requiring a two-thirds majority vote for the approval of bond issues and the like. Here, the validity of such a requirement is not at issue; consequently, there is no conflict existing between the decision of the Supreme Court of South Carolina and those of other state courts.

CONCLUSION

It is respectfully submitted, therefore, that the appellants present no substantial federal question for the decision of this Court and that, accordingly, their appeal should be dismissed. Moreover, the Secretary of State joins in the Motion to Dismiss that is being submitted by those correctly designated as appellees.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General of South Carolina,

C. TOLBERT GOOLSBY, JR.,
Assistant Attorney General of South Carolina,
Wade Hampton State Office Bldg.,
Columbia, South Carolina,
Attorneys for O. Frank Thornton, Secretary of State of South Carolina.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

TURNER ET AL. *v.* CLAY ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 982. Decided February 24, 1970

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.